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EXAMINER

SMITH, NICHOLAS A

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RICHARD PHILLIPS and IRA L. FRIEDMAN

Appeal 2008-2792
Application 10/724,248
Technology Center 1700

Decided:¹ January 30, 2009

Before CHUNG K. PAK, ROMULO H. DELMENDO, and
JEFFREY T. SMITH, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

This is in response to a Request for Rehearing (“Request”), dated
October 30, 2008, of our Decision, mailed September 25, 2008 (“Decision”),

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 CFR § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

wherein we affirmed the Examiner's § 103 rejection of appealed claims 1-10.

Appellants contend that (1) the Board misstated the issue on appeal. Specifically, Appellants contend that “[t]he issue presented is not ‘did Appellants identify reversible error in the Examiner's rejection of claims 1-10 under §103’, as stated in the Decision at page 4.” Rather, Appellants contend the issue presented is whether or not Allroth discloses the invention substantially as claimed. (Request 2). Appellants also contend that Fact-Finding (2) is in error. (Request 4).

We do not find Appellants' contentions persuasive of error in our Decision. We find that many of Appellants' contentions presented in the Request have previously been made and addressed in our Decision (Dec. 3 and 8-9).

Regarding the issue presented for appeal, Appellants have the burden on appeal to the Board to demonstrate error in the Examiner's position. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006) (“On appeal to the Board, an applicant can overcome a rejection [under § 103] by showing insufficient evidence of *prima facie* obviousness or by rebutting the *prima facie* case with evidence of secondary indicia of nonobviousness.”) (quoting *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998)).

Regarding Fact-Finding (2), we note Appellants correctly identify the Specification as describing, *inter alia*, synthetic graphite, which is inclusive of the graphite taught by Allroth, as a liquid phase former. Appellants have not established that a person of ordinary skill in the art would have recognized the graphite taught by Allroth is not included by the claimed liquid phase former. That is, Appellants have failed to demonstrate that

under appropriate compression conditions and temperature, Allroth's graphite is not a material that is able to liquefy and uniformly distribute on the particles of a metal powder.

Appellants' arguments (Request 4) regarding the solid-state diffusion properties of graphite have been considered. However, Appellants have not shown that the pressure and sintering conditions taught by Allroth would not uniformly distribute its graphite as the liquid film former on particles of metal powder.

For the above stated reasons and for the reasons expressed in our Decision, the evidence of record continues to support a prima facie case of obviousness, and Appellants continue to fail in their attempts to show error in this obviousness conclusion.

The Request for Rehearing is DENIED.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

DENIED

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